

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25-4-2006

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

S.A. No.1043 of 1997

1. Ananda Goundar
2. Kishtan

.. Appellant/Plaintiffs

vs.

1. Balakrishna Goundar
2. Ramakrishnan
3. Manickam
4. Rajamani
5. Rajendran
6. Chinnammal
7. Maniammal
8. Govindammal
9. Kamala
10. Ramayi
11. Ellammal
12. Mangai Ammal
13. Subramania Chetti

.. Respondents /Defendants

Second Appeal against the judgment and decree dated 25.11.1996 made in A.S.No.39 of 1992 on the file of the Subordinate Judge, Arni confirming the judgment and decree dated 20.4.1992 in O.S.No.189 of 1988 on the file of the Principal District Munsif, Arni.

For Appellant : Mr.M.N.Padmanabhan, S.C.
For Mr.M.N.Muthukumaran

For Respondent-1 : Mr.A.Anbarasu

JUDGMENT

The appellants are the father and son who are the plaintiffs in the suit in O.S.No.189 of 1988 on the file of the Principal District Munsif, Arni.

2. The appellants filed the said suit for partition and separate possession of 6/8 share and for allotting three such shares to the share of Ellammal, the 11th

respondent herein, vendor of the plaintiffs and to allot the remaining share from the other items of the suit properties. The respondents/defendants resisted the suit by filing written statement. On the basis of the pleadings, the trial court framed the issues and the learned Principal District Munsif perused the evidence and upon hearing the arguments of both sides, dismissed the suit. Aggrieved by the judgment and decree of the trial court, the appellants herein preferred the appeal before the Subordinate Court, Arni in A.S.No.39 of 1992. Learned Subordinate Judge after perusing the recorded evidence in the light of the judgment and decree passed by the trial court dismissed the appeal confirming the findings rendered by the trial court. Hence, the Second Appeal.

3. The facts which are necessary for the disposal of this appeal may be set out briefly hereunder:-

Originally the suit properties belonged to one Arjuna Gounder who died on 28.1.1957 (vide) Ex.A-7, the death register extract and the said Arjuna Gounder left one son Muthu Gounder and 3 daughters as his legal heirs of whom 11th and 12th respondents have been impleaded herein. The first respondent and his father Muthu Gounder filed the earlier suit in O.S.No.319 of 1975 on the file of the District Munsif, Arni for declaration and possession of the suit properties against the first appellant herein and his vendor Ellammal who is the 11th respondent in this appeal and others and obtained a decree on 9.8.1977. The said judgment and decree was questioned in the appeal both in the lower appellate court as well as in this Court by the respondents 1 and 11 herein and the same had been dismissed with the observation directing them to file a separate suit for partition and separate possession of their share. The judgments of the trial court and the first appellate court are Exs.A-3 and A-4 and the judgment of this Court is Ex.A-5 produced by the appellants in the said suit.

4. In view of the liberty given to the appellants herein they filed the suit for partition and separate possession and the trial court dismissed the suit and the same was confirmed by the first appellate court.

5. In the above circumstances, the following substantial questions of law were formulated on 22.8.1997 for consideration in this Second Appeal:-

(1) Whether the courts below are correct in law in finding that the present claim is barred by res judicata especially when liberty has been given to the daughters of Arjuna Gounder to work out their rights in a properly framed suit?

(2) Whether the courts below were correct in law in finding that the suit is barred by Order II, Rule 2 of the C.P.C. when the appellants were only defendants in the former suit O.S.No.319 of 1975?

6. Heard Mr.M.N.Padmanabhan, learned senior counsel appearing for the appellants and Mr.A.Anbarasu, learned counsel appearing for the first respondent.

7. The learned senior counsel for the appellants has submitted the following contentions:-

The courts below failed to take note of the fact that the plaintiffs in the earlier proceedings filed the suit only on the basis that the properties belonged to Arjuna Gounder and therefore the properties were not the joint family properties of Arjuna Gounder and his brothers. The appellants herein as defendants in the earlier suit pleaded that the properties belonged to Arujuna Gounder and that on his death, his three daughters also were entitled to a share in his properties. Similarly, the courts below erred in observing that the suit is bad for non-joinder of necessary parties, as the daughters of Arjuna Gounder were not made as parties to the suit. So also both the courts were not correct in observing that the present suit is barred by Order 2 and Rule 2 C.P.C. and that the suit is therefore barred by res judicata. In this connection, both the courts overlooked that liberty had been granted to the appellants as plaintiffs to work out their rights for a share in the suit properties in a properly framed suit. Hence, the relief of declaration granted to the plaintiffs in the earlier suit was only subject to the rights of the parties to work out their share in a properly framed suit for partition.

8. Learned senior counsel for the appellants has argued at the outset that the finding rendered by the trial court that this suit was barred by res judicata in view of the decision rendered in the earlier suit in O.S.No.319 of 1975 and confirmed in the appeals in A.S.No.87 of 1978 on the file of the Subordinate Court, Vellore and in S.A.No.1402 of 1980 on the file of this Court is not valid

under law for the simple reason that liberty had been given to the appellants herein to file a suit for partition and separate possession of their share in the suit properties both by the Subordinate Court and this Court in the judgments referred to above. Moreover, he has submitted that in view of the provision under Section 11 C.P.C., the same issue should have been decided on merits in the former suit and that since no issue was framed in the earlier suit with reference to the claim of the appellants herein for a share in the suit properties and decided on it, the findings rendered by both the courts below are erroneous and against the provision of law under Section 11 C.P.C.

9. In this context, learned senior counsel for the appellants has drawn my attention to the finding rendered by the Subordinate Judge, Vellore in A.S.No.87 of 1978 which reads as under:-

"It should be noted that this suit has been filed for declaration of the plaintiffs' title and for recovery of possession of the same. Therefore, as rightly contended by the learned counsel for the plaintiffs, even if the daughters of Arjuna Gounder have got any share in the suit properties the same has got to be agitated in a properly framed suit. Therefore, the contention of the learned counsel for the 1st defendant that the daughters of Arjuna Gounder have got a share in the suit properties has to be dealt with separately and not in this suit."

10. The relevant ratio laid down by this Court in the judgment in S.A.No.1402 of 1980 by this Court reads as under:-

"Learned counsel strenuously contends that Arjuna Gounder died in 1957 and that the 2nd defendant and her sisters would also be heirs in accordance with the provisions of the Hindu Succession Act, which came into force on 17.6.1956. Such a case had not been put forth at the earliest opportunity and in order to adjudicate upon the rights of the heirs of Arjuna Gounder, the presence of all such heirs would be necessary. In their absence, the right now claimed by the 2nd defendant and her sisters cannot be adjudicated upon. Inasmuch as this plea was not raised, the trial court also did not frame any issue on this aspect. Even if the daughters of Arjuna Gounder have got some rights in the suit properties, it would be open to them

to work out their rights in a properly framed suit, as directed by lower appellate court."

11. Hence, the learned senior counsel for the appellants has contended vehemently that since the leave had been granted by this Court to file a properly framed suit after impleading all the heirs of Arjuna Gounder, the appellants have instituted the suit for partition and separate possession of their share in the suit properties. The further contention of the learned senior counsel for the appellants is that the first appellant being the purchaser of the suit items 1, 2 and 3 from the 11th respondent, one of the daughters of the Arjuna Gounder under a registered sale deed dated 19.12.1963 is entitled to file the suit for general partition of his share in the suit properties and he has relied on the decision PERAMANAYAKAM PILLAI v. SIVARAMAN (1952 (1) M.L.J 308 (FB)) wherein the following principle of law on this subject has been laid down:-

"Even as amended by the Act of 1929, Section 44 of the Transfer of Property Act has not the effect of overriding the Hindu Law and would not entitle the alienee from a member of the joint Hindu family to claim joint possession of the alienor's share as a tenant-in-common by virtue of that section and his only right is to obtain by a suit for partition the share to which his alienor would be entitled."

12. Hence the learned senior counsel for the appellants has urged that since the rights of the 11th respondent herein as one of the daughters of the deceased Arjuna Gounder had not been adjudicated upon in the earlier suit, this suit is not barred by res judicata. Similarly, he has also contended that since the first appellant herein was the first defendant in the earlier suit in O.S.No.319 of 1975 and inasmuch as he purchased items 1 to 3 in the suit properties from Ellammal, 11th respondent herein for valuable consideration by virtue of Ex.A-1 sale deed dated 19.12.1963, Order 2 Rule 2 C.P.C. is not a bar for the appellants to file this suit.

13. In this context, learned senior counsel for the appellants has relied on the decision, INACIO MARTINS v. NARAYAN HARI NAIK (AIR 1993 S.C. 1756), for the legal position that even where the earlier suit for declaration and injunction was dismissed on technical ground that the plaintiff was not in possession of the property, another suit for declaration and recovery of possession is not

barred as the causes of action are different. Therefore he has submitted that more so in this case, the appellants being the defendants in the earlier suit are not precluded from filing the suit for general partition of their share by virtue of the sale deed executed by the 11th respondent being one of the heirs of the said deceased Arjuna Gounder in respect of the said properties.

14. Per contra, learned counsel for the first respondent has argued on the basis of the finding rendered by both the trial court and the first appellate court to the effect that the first respondent herein and his father Muthu Gounder were absolutely entitled to the suit properties and that therefore in view of the relief of declaration granted in their favour and confirmed by the first appellate court as well as by this Court, it is no longer open to the appellants to contend that the alienor, namely, the 11th respondent herein is entitled to a share in the suit properties as one of the heirs of the deceased Arjuna Gounder. Hence, he has urged that the judgments and decrees rendered by both the courts below have to be sustained in this appeal.

15. Though the learned counsel for the first respondent has contended that the appellants herein are estopped from making any claim over the suit properties, as has been rightly pointed out by the learned senior counsel for the appellants, in view of Ex.A-7 showing that Arjuna Gounder died intestate on 28.1.1957 after coming into force of Hindu Succession Act 1957 on 17.6.1956, the heirs of the deceased Arjuna Gounder including the daughters have got the right to claim their respective shares by instituting a properly framed suit. It has therefore become necessary that this Court under such circumstances, granted liberty to the first appellant herein and the daughters of Arjuna Gounder to work out their rights in a properly framed suit as referred to above. In view of such aspects of the matter, this Court is unable to agree with the contentions put forth by the learned counsel for the first respondent.

16. It is no doubt true that the appellants herein have instituted this suit before the trial court on 24.2.1988 immediately after the disposal of the said S.A.No.1402 of 1980 on 29.1.1988. Therefore, the next contention put forth by the learned counsel for the first respondent that the appellants have failed to exercise the rights as per the observation made by this Court in the said Second Appeal within reasonable time cannot also be countenanced as the suit has been laid within 30 days from the date of the judgment rendered by this Court in

S.A.No.1402 of 1980. In any view of the matter, the above facts and circumstances would indicate clearly that the present suit was neither barred by res judicata under Section 11 C.P.C. nor hit by the provision under Order 2 Rule 2 C.P.C. as contended by the learned counsel for the first respondent and therefore this Court is of the considered view that the judgments and decrees passed by the courts below have to be set aside as the same caused grave injustice to the appellants and the matter remanded to the trial court for disposal in accordance with law.

17. For the aforesaid reasons, the Second Appeal is allowed setting aside the judgments and decrees passed by the courts below and the suit is remitted back to the trial court for fresh disposal after giving sufficient opportunity to both sides to adduce evidence and to advance their arguments, in accordance with law and in view of the observations made in this judgment. However, the parties herein are directed to bear their respective costs.
dpp

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Arni.
2. The Principal District Munsif, Arni. (with records)
3. The Section Officer, V.R.Section, High Court, Madras.

+ one cc to Mr. P.R. Rajaraman, Advocate sr no. 21465
+ one cc to Mr. M.N. Padmanabhan, Advocate sr no. 18970

AVA(CO)
NM(14.07.2006)

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